

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID DOUCETTE, SR.,)	CASE NO. C05-0863-RSL-MAT
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY
JO ANNE B. BARNHART,)	DISABILITY APPEAL
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff David Doucette, Sr., proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (“Commissioner”). The Commissioner denied plaintiff’s applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) benefits under Titles II and XVI of the Social Security Act (“SSA”) after a hearing before an Administrative Law Judge (“ALJ”).

Having considered the ALJ’s decision, the administrative record (“AR”), and all memoranda of record, it is recommended that this matter be remanded for an award of benefits.

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REPORT AND RECOMMENDATION RE:
SOCIAL SECURITY DISABILITY APPEAL
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I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1949.¹ He completed the tenth or eleventh grade and later obtained his GED. (AR 162, 207). He received community college vocational training in Mechanical/CAD drafting. (AR 207). Plaintiff has worked as a plasterer, mechanical drafter and mechanical helper/brake repairer. (AR 29).

In March 1996, plaintiff filed an application for DIB, alleging a disability onset date of February 7, 1995. (AR 122). In August 1996, his application was denied and no appeal was taken. (AR 104-107). In March 1997, plaintiff again filed an application for DIB, alleging the same disability onset date. (AR 132). Plaintiff's application was denied initially and on reconsideration, and he timely requested a hearing. (AR 106, 120). Plaintiff's claim was dismissed in July 1999 due to his failure to appear for his hearing. (AR 591-93). In March 1999, plaintiff again filed an application for DIB, alleging the same disability onset date. (AR 135). Plaintiff's claim was denied administratively and no appeal was taken. These prior applications are not at issue in this action.

In November 2002, plaintiff applied for SSI, alleging a disability onset date of November 10, 2001. (AR 914). In December 2001, plaintiff also applied for DIB, alleging the same disability onset date. (AR 627, 633). The Commissioner denied plaintiff's applications initially and on reconsideration, and he timely requested a hearing. (AR 596-99, 602-04).

ALJ Mary F. Gallagher Dilley held a hearing on November 13, 2003, and heard testimony

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 from plaintiff, plaintiff's son, David Doucette, Jr., and vocational expert Michael Swanson. (AR
02 41-103). On June 16, 2004, the ALJ issued a decision denying plaintiff's applications for DIB and
03 SSI benefits. (AR 28-40). Plaintiff appealed the ALJ's decision to the Appeals Council, which
04 declined to review plaintiff's claim. (AR 11). Plaintiff appealed this final decision of the
05 Commissioner to this Court.

06 **II. JURISDICTION**

07 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

08 **III. STANDARD OF REVIEW**

09 The court may set aside the Commissioner's denial of social security benefits when the
10 ALJ's findings are based on legal error or not supported by substantial evidence in the record as
11 a whole. *See* 42 U.S.C. 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993); *Smolen v.*
12 *Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as more than a mere
13 scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might
14 accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.
15 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony,
16 and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where
17 the evidence is susceptible to more than one rational interpretation, it is the Commissioner's
18 conclusion that must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

19 **IV. DISCUSSION**

20 The Commissioner follows a five-step sequential evaluation process for determining
21 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
22 be determined whether the claimant is gainfully employed. The ALJ found that plaintiff had not

01 engaged in substantial gainful activity since his alleged disability onset date. At step two, it must
02 be determined whether a claimant suffers from a severe impairment. The ALJ found severe
03 plaintiff's heroin addiction on methadone taper since June 2002, depression, hepatitis C, coronary
04 artery disease, inguinal hernia status post bilateral repair, decreased hearing and tinnitus, tobacco
05 addiction, chronic anemia, blind right eye, and status post L4 compression fracture. At step three,
06 it must be determined whether a claimant's impairment(s) meets or equals a listed impairment.
07 The ALJ found that plaintiff's impairments did not meet or equal a listed impairment. If a
08 claimant's impairments do not meet or equal a listing, the Commissioner must assess residual
09 functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an
10 inability to perform past relevant work. The ALJ assessed plaintiff's RFC and found him able to
11 perform his past relevant work as a mechanical drafter. Alternatively, the ALJ found at step five
12 that plaintiff could perform other work that exists in significant numbers in the national economy,
13 such as machine packager, industrial cleaner, and warehouse worker. Thus, the ALJ found
14 plaintiff was not disabled at step four and, alternatively, at step five. (AR 28-39).

15 Both parties agree that the ALJ erred, and that this case must be remanded. The sole issue
16 is whether this case should be remanded with instructions to award benefits, as urged by plaintiff,
17 or remanded for further administrative proceedings, as urged by the Commissioner.

18 The Court has discretion to remand for further proceedings or to award benefits. *See*
19 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
20 where "the record has been fully developed and further administrative proceedings would serve
21 no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).

22 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient

01 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
02 must be resolved before a determination of disability can be made; and (3) it is clear
03 from the record that the ALJ would be required to find the claimant disabled if he
04 considered the claimant's evidence.

05 *Id.* at 1076-77. For the reasons described below, the undersigned concludes that this matter
06 should be remanded for an award of benefits.

07 A. Plaintiff Was Limited To Simple Work And Therefore Was Disabled On His Fifty-
08 Fifth Birthday.

09 Plaintiff argues that the ALJ failed to provide legally sufficient reasons for rejecting the
10 opinions of treating psychiatrist Lawrence G. Wilson, M.D., and examining psychiatrist Gail Li,
11 M.D., finding that he was limited to simple work. The Commissioner agrees that there was legal
12 error, but argues that unresolved issues regarding the opinion of Dr. Wilson require further
13 development and that the Court should remand for further proceedings to re-contact Dr. Wilson
14 to clarify his opinion.

15 In May 2003, treating psychiatrist Lawrence G. Wilson, M.D., began treating plaintiff on
16 referral from plaintiff's treating family physician Freya Spielberg, M.D. (AR 901). In his
17 treatment notes from October 29, 2003, Dr. Wilson indicated that plaintiff stated if he "does not
18 get Social Security, he is not quite sure what kind of work he could do, but perhaps he could do
19 something very simple." (AR 893)(emphasis added). Approximately two weeks earlier, on
20 October 9, 2003, evaluating psychologist David M. White, M.D., noted that he had spoken with
21 Dr. Wilson by telephone regarding plaintiff's ability to work. Dr. Wilson reported that "from a
22 psychiatric standpoint, it would have to be pretty simple." (AR 734)(emphasis added).
Furthermore, the ALJ specifically endorsed Dr. Wilson's opinion that plaintiff was limited to

01 simple work:

02 Significant weight has also been given the opinion of the claimant's treating
03 psychiatrist, Dr. Wilson. He stated that the claimant could perform simple tasks. The
04 claimant's depression improved with medications and there was no evidence of
05 psychotic level thinking. His mood was good (Exhibits B9F/9, B12F-B13F). His
06 opinion is well supported and is not inconsistent with the other substantial evidence
07 in the case record. (Social Security Ruling 96-2p).

08 (AR 37)(emphasis added). In addition, Dr. Wilson's opinion is consistent with the opinion of
09 examining psychiatrist Gail Li, M.D., that plaintiff was limited to "simple and repetitive tasks."
10 (AR 693). Like Dr. Wilson's opinion, the ALJ cited Dr. Li's opinion at length but did not
11 specifically reject it. Although it may be unclear from Dr. Wilson's October 29, 2003, treatment
12 note alone whether he agreed with or endorsed plaintiff's statement, it is clear from the record that
13 the ALJ would be required to find that plaintiff was limited to simple work if she considered the
14 of opinions of Drs. Wilson, White, and Li.

15 As the Commissioner notes, whether or not plaintiff was limited to simple work is key, as
16 plaintiff could not perform his past relevant work, which is a skilled position. (Dkt. #17 at 8).
17 Furthermore, if plaintiff was limited to simple work, he would meet the Medical-Vocational
18 Guidelines² as of his fifty-fifth birthday in March 2004. *Id.* According to the Guidelines,
19 individuals approaching advanced age, who "can no longer perform vocationally relevant past
20 work and have no transferable skills," will ordinarily be found disabled. 20 C.F.R. Pt. 404, Subpt.
21 P., App. 2, § 201.00(g). As noted above, the Court may direct an award of benefits where "the

21 ² The Medical-Vocational Guidelines, commonly known as the grids, are a matrix system
22 for handling claims that give a finding of disabled or not disabled for various combinations of age,
education, and work experience. 20 C.F.R. Part 404, Subpt. P, App. 2.

01 record has been fully developed and further administrative proceedings would serve no useful
02 purpose.” *McCartey*, 298 F.3d at 1076. Here, it is clear from the record adopted by the ALJ that
03 plaintiff was limited to simple work, and therefore, was disabled as a matter of law on his fifty-fifth
04 birthday in March 2004. Accordingly, plaintiff met his burden to prove that he could not perform
05 any of his past relevant work. (Dkt. # 13 at 11-12). Because there are no outstanding issues that
06 must be resolved before a disability determination can be made and because further administrative
07 proceedings would serve no useful purpose, the Court agrees that the matter should be remanded
08 for an award of benefits for the period beginning on plaintiff’s fifty-fifth birthday in March 2004.

09 B. The ALJ Erred in Rejecting Lay Witness Testimony.

10 Plaintiff also argues that the ALJ erred in rejecting the lay witness testimony of his son,
11 David Doucette, Jr. The ALJ based his decision to reject plaintiff’s son’s testimony on the basis
12 that the testimony came from a “close relationship” and because “it would be in the best financial
13 interest of [the] witness to corroborate the claimant’s statements.” (AR 36-37).

14 Disregarding testimony of friends and family members violates 20 C.F.R. § 404.1513. An
15 ALJ must consider a lay witness’ observations of how claimant’s impairments affect his ability to
16 work. 20 C.F.R. § 404.1513; *Smolen*, 80 F.3d at 1288. An ALJ may reject such testimony only
17 if “reasons germane to each witness” are given. *Dodrill*, 12 F.3d at 919. Discounting family
18 witnesses based on the rationale that they are advocates and therefore biased amounts to a
19 “wholesale dismissal of the testimony of all the witnesses as a group and therefore does not qualify
20 as a reason germane to each individual who testified.” *Smolen*, 80 F.3d at 1289. The ALJ clearly
21 erred in rejecting the son’s testimony based on her finding that he was inherently untrustworthy
22 due to his relationship with plaintiff. For the reasons set forth below, however, a remand to

01 consider the statement is not necessary.

02 C. Substantial Evidence Does Not Support the ALJ's Residual Functional Capacity
03 Assessment and Hypothetical to the Vocational Expert.

04 Plaintiff next contends that he was disabled at step five given the opinion of his treating
05 physician Freya Spielberg, M.D., submitted to the Appeals Council, that he could only perform
06 less than sedentary work on a half-time basis. (AR 932). Plaintiff also contends that the ALJ
07 failed to include any limitations in the RFC assessment or in the vocational hypothetical to simple
08 work, monocular vision, and bending forward 30-90 %. ³ The Commissioner concedes that on
09 remand the ALJ should consider the opinion of Dr. Spielberg in combination with the record as
10 a whole, and should consider plaintiff's monocular vision as part of the RFC. Inasmuch as the
11 RFC assessment and vocational hypothetical did not include all of plaintiff's limitations, the Court
12 finds that the ALJ's reliance on the vocational expert's testimony in finding residual functional
13 capacity for other work in the national economy is not supported by substantial evidence. The
14 case might be remanded for the ALJ to reconsider and re-weigh these factors, as the
15 Commissioner suggests, except the vocational expert's testimony was otherwise fatally flawed,
16 as discussed below.

17 D. The ALJ Erred in Relying on the VE's Testimony that Contradicted the DOT
18 Without Including an Explanation.

19 Plaintiff argues that the testimony of the vocational expert ("VE") must be discredited

20
21 ³ Plaintiff also argues that his past relevant work as a mechanical drafter requires more than
22 basic math. (Dkt. #13 at 17-18). Plaintiff misapprehends the ALJ's utilization of a hypothetical
that included an ability to do basic math, which does not amount to a finding that the plaintiff is,
in fact, so restricted. The argument is non-availing.

01 because it conflicted with the Dictionary of Occupational Titles (“DOT”) and the VE offered no
02 explanation for this contradiction.

03 In determining whether appropriate jobs exist for the claimant, the ALJ generally will refer
04 to the DOT. *See Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997). The DOT raises
05 rebuttable job classification presumptions. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir.
06 1995). An ALJ may rely on expert testimony which contradicts the DOT, but only insofar as the
07 record contains persuasive evidence to support the deviation.” *Id.* at 1435. Evidence sufficient
08 to support such a deviation may be either specific findings of fact regarding claimant’s residual
09 functionality, or inferences drawn from the context of the expert’s testimony. *Light*, 119 F.3d at
10 793.

11 Based on the ALJ’s hypothetical of a claimant of plaintiff’s age, education, and work
12 experience with the limitations identified in the ALJ’s RFC finding, the VE identified the
13 categories of machine packager, industrial cleaner, and warehouse worker as suitable jobs. (AR
14 98-100). In her decision, the ALJ concluded that plaintiff could perform these jobs. (AR 39).
15 However, plaintiff alleges, and the Commissioner apparently concedes, that the VE’s testimony
16 differed from the DOT in that the VE identified the jobs of machine packager, industrial cleaner,
17 and warehouse worker as “light,” and the DOT classifies them as “medium.” (See Dkt. #13 at 14,
18 Attachment 1). Plaintiff argues that the vocational expert did not offer an explanation for her
19 deviation from the DOT. (Dkt. #13 at 14-15). Moreover, the ALJ neither mentioned this
20 deviation in her decision nor made findings of fact that would support it. Without such
21 explanation, the record does not establish a legitimate basis for the deviation or whether the VE,
22 using the correct DOT classification for these positions, would still find plaintiff capable of

01 performing these jobs. Accordingly, the VE's opinion does not constitute substantial evidence and
02 as a result, the Commissioner has failed to meet her burden of demonstrating that the claimant
03 retains the ability to perform other work activity in the national economy. Because the existing
04 record and findings will not support the denial of benefits on the ALJ's stated rationale, the
05 decision should be reversed. When the opinion of the VE is set aside, there is no reasoned basis
06 for the Commissioner's Step-Five finding that the plaintiff is not disabled. Therefore, it is
07 appropriate to remand the case for an award of benefits.

08 V. CONCLUSION

09 For the reasons set forth above, the Commissioner's decision in this case should be
10 remanded for an award of benefits. A proposed Order accompanies this Report and
11 Recommendation.

12 DATED this 30th day of January, 2006.

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14 
15 Mary Alice Theiler
16 United States Magistrate Judge
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